UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JTH TAX, INC. d/b/a LIBERTY TAX SERVICE,	}	
Plaintiff,	}	**Civil No. 2:07cv169**
v.	}	
JEROME REED,	}	
Defendant.	}	

LIBERTY'S MEMORANDUM IN RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Plaintiff JTH Tax, Inc. d/b/a Liberty Tax Service ["Liberty"], by counsel, files this Memorandum in Response to Defendant, Jerome Reed's ["Reed"] Motion to Dismiss for Lack of Subject Matter Jurisdiction.

I. Summary of Response

Reed is bound by the amount claimed by Liberty unless it was apparent, to a legal certainty, that Liberty could not recover the amount claimed. Reed has failed to assert any argument which would establish to a legal certainty that Liberty could not have recovered the amount claimed in its Complaint.

II. Subject matter jurisdiction exists under 28 U.S.C. § 1338(a) in that a portion of the claim is based on diversity jurisdiction.

The evidentiary standard of motions made pursuant to Federal Rule of Civil Procedure 12(b)(1) depends upon whether "the challenge is a facial attack on the sufficiency of the

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pleadings, or an attack on the factual allegations that support jurisdiction." *Allen v. The College of William & Mary,* 245 F. Supp.2d 777, 782-783 (E.D. Va. 2003). Where Reed contests the sufficiency of the complaint, the court must accept all of the complaint's factual allegations as true. *Id.* at 783. Where Reed claims that the jurisdictional facts alleged in the compliant are untrue, the pleadings are regarded as evidence. In this instance, the court weighs the pleadings and all of the other evidence to determine whether subject matter jurisdiction exists. *Id.* When a court reviews the legal sufficiency of a complaint, the Court must construe the factual allegations "in the light most favorable to plaintiff." *Id.* at 783.

Moreover, the defendant "is ordinarily bound by the amount claimed by the plaintiff unless it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed." *McDonald Bros., Inc. v. Tinder Wholesale, LLC.,* 395 F. Supp.2d 255, 262 (M.D.N.C. 2005) *citing Thomson v. Gaskill,* 315 U.S. 442, 446 (1942). "Unless the claim for an amount over the jurisdictional prerequisite is made in bad faith, or unless it is plain from the complaint that an amount less than the jurisdictional amount is all that is at issue, the district court has jurisdiction over the case." *McDonald,* 395 F. Supp.2d 255 *citing Shanaghan v. Cahill,* 58 F.3d 106, 112 (4th Cir. 1995).

A. Liberty's Diversity Jurisdiction Contention was Facially and Factually Sufficient.

Liberty's Complaint based on Reed's Breach of the Franchise Agreement has been sufficiently pled. Liberty has alleged that Reed's failure to comply with the forum selection clause in the Franchise Agreement with Liberty has caused Liberty to suffer damage. Compl. ¶ 16.a.

In evaluating the facial sufficiency of the Complaint, the Court must accept Liberty's allegations as true. In accepting Liberty's allegations as true, Liberty has clearly stated a cause of action based on breach of the Franchise Agreement. Liberty stated that Reed had a duty to comply with the forum selection clause in the Franchise Agreement. Compl. 16.a. Liberty stated that Reed breached his duty to comply with the obligation to bring suit in Virginia. *Id.* Liberty further stated that Reed's breach of the Franchise Agreements caused Liberty to suffer damages. *Id.*

Reed falsely states that "Plaintiff's lawsuit is for $27,799.94, which does not meet the threshold jurisdictional amount in controversy requirement." In its Motion for Default Judgment Liberty seeks $27,799.94. However, Reed did not contest Liberty's Motion to Transfer Venue filed in New Jersey and that litigation was therefore cut short. At the time of filing its Complaint, Liberty's prayer for damages in the amount of $150,000 was proper because at that time, the damages Liberty could have incurred from hiring New Jersey counsel to defend Reed's action which was in breach of the forum selection clause clearly could easily have exceed the $75,000 amount in controversy requirement. "The amount in controversy for federal diversity jurisdiction purposes is determined as of the time the action is commenced. Subsequent actions cannot divest the court of jurisdiction, once it has been acquired. *Worthams v. Atlanta Life Ins., Co.*, 533 F.2d 994, 997 (6th Cir. 1976).

The amount in controversy requirement is taken from the Complaint so long as it is claimed in good faith. Moreover, Liberty is not obligated to painstakingly prove amount of damages due and must only show that there is no legal certainty that suit is really for less than jurisdictional amount. *Esler v. Northorp Corp.*, 86 F. R.D. 20 (W.D. Mo. 1979); *see also, Saint Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938)(The amount claimed in good faith by the plaintiff controls jurisdiction); *Heavner v. State Auto Ins. Co. of Columbus, Ohio*, 340 F. Supp. 391, 393 (W.D. Va. 1972); *Ingersoll-Rand Financial Corp. v. Electro Coal, Inc.*, 496 F. Supp. 1289 (E.D. Ky. 1980)(Amount allegedly due plaintiff need not be known exactly at beginning of case and it need not be absolutely certain amount will turn out to be more than jurisdictional amount as long as sum claimed by plaintiff is apparently made in good faith.)

B. It was not a "legal certainty" that Liberty would not be awarded an amount in excess of the jurisdictional requirement.

Federal courts apply the "legal certainty" test when determining whether the complaint pled the amount in controversy in good faith. *Id.* The Supreme Court of the United States stated that "it must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." *Id.* "Thus, if the right of recovery is uncertain, courts should resolve the doubt in favor of the subjective good faith of the plaintiff." *Id.* citing *McDonald v. Patton,* 240 F.2d 424, 426 (4th Cir. 1957) and 15 *Moore's Federal Practice § 102.106[1]* (3d ed. 1997); *see also, McDonald Bros., Inc. v. Tinder Wholesale, LLC.*, 395 F. Supp.2d 255, 262 (M.D.N.C. 2005). *Bishop v. Byrne*, 265 F. Supp. 460 (S.D. W.Va. 1967)(Unless it appears to a legal certainty that plaintiff cannot recover a particular sum, a court cannot dismiss the action because it seems highly unlikely that sum can be recovered.)

Reed states, "In this case, the Plaintiff knew when the Complaint was filed that only $10,625.80 was allegedly due from the Defendant, and it had not incurred any substantial legal fees, since no response to the New Jersey lawsuit had been filed. Even after all of the legal pleadings had been filed to transfer venue, the amount of the attorney's fees allegedly incurred, when added to the contract claim, do not even come close to the jurisdictional amount and were equal to 162% of the contract claim itself." Reed Memo p. 5.

Liberty had every right to bring suit for damages which Reed was causing to Liberty by filing a suit in New Jersey. In fact, Liberty clearly stated in its Complaint that Reed's New Jersey suit was "causing Liberty to incur tens if not hundreds of thousands of dollars in legal fees which Liberty would not incur if Reed had honored Section 15.b. of his franchise agreements and sued in Virginia where Liberty uses salaried in-house counsel to defend cases of this nature." Compl., ¶ 16(a). At the time Liberty filed suit, its damages easily could have exceeded the $150,000 it initially sought. The only reason legal fees did not climb to this amount is because Reed did not contest Liberty's Motion to Transfer Venue from New Jersey to Virginia. Had a venue battle ensued, Liberty's legal fees would have risen quickly and could easily have gone over the $75,000 amount in controversy requirement.

Reed cites to *Friedman's, Inc. v. Dunlap*, 290 F.3d 191, 195 (4th Cir. 2002) to bolster his argument that subject matter jurisdiction is nonexistent. Reed's Memo, p. 5. In *Friedman's* the court held, "We also conclude that federal jurisdiction is lacking, but we need not reach the amount in controversy issue in coming to this conclusion inasmuch as another jurisdictional defect exists." *Id.* In fact, the reason subject matter jurisdiction did not exist in this case is because there was a bar to punitive damages contained in the underlying arbitration clause. Therefore, the only damages that could have reasonably been awarded would be in the amount of $8,000. *Id.* This case is far different from Liberty's suit against Reed where no such clause or bar precluded Liberty from receiving all damages associated with Reed's breach of the forum selection clause which, at the time of filing of the suit, could easily have exceeded the jurisdictional amount.

Reed's confusion appears to stem from the fact that Liberty seeks merely $27,799.94 in its Motion for Default Judgment. Reed somehow construes this as indicative of some bad faith attempt by Liberty to bring this action in federal court. Reed fails to acknowledge that at the time Liberty filed the suit, it clearly met the amount in controversy requirement. This Court has held, "Unless the claim for an amount over the jurisdictional prerequisite is made in bad faith, or unless it is plain from the complaint that an amount less than the jurisdictional amount is all that is at issue, the district court has jurisdiction over the case." *Shanaghan v. Cahill*, 58 F.3d 106, 112, 112 (4th Cir. 1995).

Moreover, Reed bases his argument that subject matter jurisdiction does not exist on a factual attack of Liberty's claims. "When a factual attack on subject matter jurisdiction involves the merits of a dispute, '[t]he proper course of action for the district court … is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case." *Garcia v. Copenhaver, Bell & Assoc.*, 104 F.3d 1256, 1261 (11th Cir. 1997).

Reed misconstrues Liberty's demand for attorney's fees. Liberty does not seek attorney's fees under some provision of the contract. Liberty seeks these attorney's fees as damages in a breach of the franchise agreement action. In *JTH Tax, Inc. d/b/a Liberty Tax Service v. Charon*, a similar case, this Court awarded Liberty $9,718.52 in legal fees associated with defending the defendant's Texas suit which was brought by the defendant in violation of the identical forum selection clause at issue in this case. (Case No. 2:05cv69, Judge Smith October 27, 2006, at p. 26.)(Opinion and Order attached previously to Liberty's Memo in Support of Def. Judgment.) The Court cited various cases to support the award of damages for breach of a forum selection clause. *Id.* *See, Omrom Healthcare, Inc. v. Maclaren Exps. LTD.*, 28 F.3d 600, 604 (7th Cir. 1994)(suggesting that plaintiff could have sought damages for breach of a forum selection clause); *Lab. Corp. of Am. V. Upstate Testing Lab., Inc.*, 967 F. Supp. 295, 299 (N.D. Ill. 1997)(holding that plaintiff has a right to enforce the forum selection clauses and recover damages for its breach); *Indosuez Int'l Fin., B.V., v. Nat'l Reserve Bank,* 758 N.Y.S.2d 308, 311 (N.Y. App. Div. 2003)(holding that "damages may be obtained for breach of a forum selection clause"); *Tasteful Treasures, Inc. v. Wiethorn,* No. CH04-1239 (Va. Cir. Ct. June 21, 2004)(awarding attorney's fees for defendant's breach of a contractual forum selection clause).

Considering these attorney's fees could have easily surmounted the $75,000 amount in controversy requirement at the time of filing, Liberty's Complaint demand was made in good faith and therefore, diversity jurisdiction existed at the time of filing the Complaint. Liberty should not now be penalized for seeking a lower amount of damages in its Motion for Default Judgment.

II. Conclusion

For all of the foregoing reasons, Reed's Motion to Dismiss for Lack of Subject Matter Jurisdiction should be denied.

JTH Tax, Inc. d/b/a Liberty Tax Service

By: ________________/s/______________________

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of September 2007, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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